



After reviewing the record and considering the arguments of the parties, the Appeals Board finds the decision by the Special Administrative Law Judge denying respondent's request to impose liability on the Kansas Workers Compensation Fund should be affirmed.

Claimant sought and was awarded benefits for a low back injury which arose out of and in the course of his employment on April 17, 1990. The injury triggered Staphylococcus infection and the infection resulted in damage which in turn caused the need for back surgery. The infection and back surgery were at the L2-3 level. Claimant had, in 1975, injured his low back and underwent a two (2) level fusion at L4-5 and L5-S1. Respondent knew of the prior injury and fusion. Respondent did not, however, have any knowledge of the Staphylococcus bacteria in claimant's system. Both Dr. Daniel R. Hinthorn and Dr. Roger Hood testified. Dr. Hood rated claimant's impairment at thirty to thirty-five percent (30-35%). Both physicians indicated there was not a relationship between the two (2) level fusion in 1975 and the current infection.

In order to establish liability for the Kansas Workers Compensation Fund, the respondent must show either that the injury would not have occurred but for the pre-existing impairment or, in the alternative, that the pre-existing impairment contributed to the resulting disability. K.S.A. 1989 Supp. 44-567. As indicated, both physicians felt that the two (2) level fusion in the mid-1970s had no relationship to the infection which was activated by the trauma of the injury at issue in this case. The Appeals Board, therefore, finds that respondent has not established either of the above two (2) alternatives for imposing liability on the Kansas Workers Compensation Fund.

The Appeals Board notes that the Award in this case was for a total of thirty-five percent (35%) disability. While the Special Administrative Law Judge did not so indicate, it appears likely that he has included in the overall Award some of the impairment resulting from the fusion and surgery from L4-S1 in 1975. The appropriateness of the determination of the nature and extent of disability was not raised on appeal and is not decided here.

**WHEREFORE**, the Appeals Board finds that the Award of Special Administrative Law Judge William F. Morrissey dated July 29, 1994 should be, and the same is hereby, affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of July 1995.

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BOARD MEMBER

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BOARD MEMBER

c: John A. Emerson, Lawrence, KS

John David Jurcyk, Lenexa, KS  
J. Paul Maurin III, Kansas City, KS  
William F. Morrissey, Special Administrative Law Judge  
David Shufelt, Acting Director